No. 180.

Brief of Calhoun

Filed Sept. 16, 1898.

Office Supreme Court U. S.
FILED
SEP 16 1898
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 180.

CALVIN A. CALHOUN,
Appellant,
vs.
OSCAR H. VIOLET,
Appellee.

In the Supreme Court of the United States.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

(16,691.)

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 180.

CALVIN A. CALHOUN,
APPELLANT,
vs.
OSCAR H. VIOLET,
DEFENDANT.

IN THE SUPREME COURT OF THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

STATEMENT OF FACTS, BRIEF AND ARGUMENT.

This is an action in equity brought by Calvin A. Calhoun, plaintiff and appellant, against Oscar H. Violet asking to have a resulting trust declared to his use and benefit, vesting in him the title and right to the land described in his petition filed in the Court below. The final certificate and patent, through error in the proceedings by the officials of the Land Department, were issued to the defendant, Oscar H Violet, when in equity and under a proper application of the law to the facts as established by the evidence they should have been issued to the plaintiff. By a mistake of the commissioner of the general land office plaintiff was required to relinquish his entry upon Lot 10, containing 16¼ acres and an essential part of his original homestead entry; and the defendant was

allowed to enter the same, and finally the patent was issued to him in violation of the plaintiff's right in the premises. The plaintiff sets out the following facts in his complaint as a cause of action against the defendant to which the defendant enters a general demurrer. First, that plaintiff is a legally qualified entryman; Second, that he has not had the benefit of his homestead right; Third, that he is an honorably discharged union soldier who served more than ninety days in the late civil war and has remained loyal to the government since his discharge. Fourth, that on the 23rd day of April, 1889, he made entry of lots 6, 7, 8, 9, and 10, Sec. 3, Township 11, N. R. 3 west of 2 M., at the Guthrie land office, I.T. (now Oklahoma) and paid the required fee and commission for said entry. Fifth, that he made said entry under the provisions of the Soldiers' Homestead Act of June 1872; made the required affidavit, form 4065, and filed a certified copy of his service in and discharge from the army with his homestead entry. Sixth, that on the evening of April 23, 1889, he made settlement on said land and has resided thereon up to the present time. Seventh, that he has complied with the requirements of the homestead laws in every respect, and has cultivated and improved the land to the extent in value of one thousand dollars Eighth, that on the 24th day of February, 1890, he received notice through the local land office at Guthrie, O. T., that his entry was suspended for the reason that his land laid on both sides of a meandering stream, to-wit: lot 10 on the south side and lots 6, 7, 8 and 9 on the north side of the north fork of the Canadian river, and that within 30 days he must elect on which side he would relinquish his claim to the land, and that in case he failed or refused his whole entry would be held for cancellation; a copy of said order is attached to plaintiff's petition. Ninth, that on the 17th day of March, 1890, and within the 30 days, plaintiff filed his relinquishment of said lot 10 in the land office at Guthrie, under protest, both written and verbal, and on the following day, March 18th, defendant made his entry of said lot No. 10.

Tenth, that in 1891 the Secretary of the Interior reversed the ruling of the commissioner and held that the North Canadian river had been improperly held to be a meandering stream, and that a homestead can be legally, held a part of which lays on opposite sides of said river. Eleventh, that on the 15th day of May, 1893, and long before the final receipt was issued to the defendant plaintiff filed in the local land office at Oklahoma City, O. T., a motion or application asking for reinstatement of his entry upon said lot—a copy of which is attached to plaintiff's petition. Twelvth, that plaintiff's application asking for reinstatement of his entry was overlooked and never acted upon by the commis-

sioner of the land office, and the final receipt and patent was issued to the defendant in violation of plaintiff's right to and equity in said land. Thirteenth, that defendant had full knowledge of plaintiff's claim upon said lot and of the fact that he relinquished his right under protest, and in compliance with an order issued by the commissioner of the land office threatening to hold his whole entry for cancellation in case he failed to relinquish within the 30 days allowed. Fourteenth, that the lots 6, 7, 8 and 9, on the north side of the said river only contain about 132 acres of land, 28 acres less than plaintiff is entitled to enter as a homestead. Fifteenth, that prior to the opening of Oklahoma Territory to settlement, in the spring of 1888, plaintiff worked for the Santa Fe railroad company as a carpenter on their line through Oklahoma Territory and was acquainted with the land in the vicinity of Oklahoma Station, near where the land in controversy is located. Seventeenth, that on the 20th day of April, 1889, plaintiff was at Arkansas City, in the State of Kansas, and that on the afternoon of that day he took the south bound passenger train on the Santa Fe railroad and visited Oklahoma,a Station, on said railroad within Okahoma Territory, arriving at the station after dark in the evening: stayed there over night and until about 8 o'clock the next morning, April 21st, when he took the north bound passenger train and returned to Arkansas City, and remained there until the Santa Fe passenger train left for the Oklahoma opening on the morning of April 22nd and entered the Territory with the crowd, after 12 o'clock, and stopped at the Guthrie land office and succeeded in making his entry in the afternoon of April 23rd, and the same evening went to Oklahoma Station near where the land entered is located and made settlement thereon. Eighteenth, that the whole claim is of the value of twenty-five thousand dollars. These are the facts substantially as they occurred, and as they are set out in plaintiff's petition and admitted by defendant's demurrer.

ERRORS OF THE COURT

(The errors of the Territorial Court are not fully set out on pages 29 and 30 of the printed record; we therefore state fully what we regard as errors in the opinion.)

The court errs in failing to state fairly and fully the facts as set out in plaintiff's petition, and in not considering the questions of law presented by plaintiff's attorneys as they are clearly stated in his brief, petition, and motion for a rehearing, much of which will be found in the printed record.

The comments of the court are uniformly against the plaintiff. The

court finds that plaintiff relinquished under the directions contained in the commissioner's letter, but say nothing about his relinquishment being made under protest, both written and verbal; facts which are set out in plaintiff's petition and acknowledged by defendant's demurrer.

Second, the court finds that immediately upon Calhoun's relinquishment that Violet filed a homestead upon lot 10 and on December 29, 1893, made final proof. The court here mentions the fact that plaintiff had filed an application for reinstatement on May 5, 1893. seven and one-half months prior to the time of Violet's final proof, and also that in the mean time it had been decided that the order requiring Calhoun's relinquishment for said lot 10 was erroneous. Here again the court comments saying: "No appeal was taken from the order requiring the relinquishment and no steps appear to have been taken by him to have his entry reinstated from the time of his relinquishment until he filed his application to be reinstated." The court wholly fails to consider the legal effect of filing the application for reinstatement. Third, the court comments upon the contests filed against the plaintiff and the final cancellation of his entry for the land on the north side of the river, and quotes the Secretary's misstatements of the evidence in the case, as stated by Perkins & Chandler plaintiff's attorneys. The court mistakes the conclusions of the Secretary for the finding of facts which must stand as conclusive against the plaintiff, notwithstanding the facts as testified to by plaintiff and stated by his attorneys, are set out in full in plaintiff's petition and appear on page 6 of the printed record and are admitted by the demurrer. The court closes its eyes against the facts and evidence favorable to the plaintiff. The plaintiff further alleges that neither the Commissioner of the General Land Office nor the Secretary reviewed the evidence, or considered the legal questions involved in his case which is admitted by the demurrer. Yet the court fails to notice or even give to it the cold respect of a passing glance. The court erroneously holds that the findings of the Secretary, although admitted to be erroneous, are conclusive against the plaintiff. Fourth, on page 16 is a model specimen of the apparent bias of the court. It says: "We think the laws properly applied to the facts as found by the land department is sufficient upon which to base a finding that Calhoun was disqualified to enter land." Here the court injects a condition that does not exist in this case. It says, "that it is well settled that a person who was within the boundaries of the land therein open to settlement under the act of March 2, 1889, and who by reason of having been therein gained an advantage over those who remained outside is thereby disqualified from acquiring any land. Here the court seems to assume that the evidence

shows, and that the officers of the land department found that the plaintiff gained an advantage by being in the Territory during the interval between March 2nd and April 22nd, neither of which is true—there was no such charge made in any of the contest complaints nor no evidence offered to prove advantage and no such findings by the Secretary. But if it had been known by the contestants that the question of advantages would cut any figure in the case the charge would have been made and the proof no doubt would have been furnished. However, we object to the court supplying the unknown and omitted necessity.

There is not a word of favorable comment in the whole decision for the plaintiff The facts set up in the petition and admitted are ignored. The questions of law presented by his attorneys are passed without comment, and no despot of the past, that we have any knowledge of, has ever assumed a more arbitrary power. Fifth, on same page near bottom of page, the court admits that if the old soldier is exempt from the prohibition, that the plaintiff is not disqulified, and then proceeds to misquote and misconstrue the proviso in the act of March 2, 1889, which declares that the honorably discharged Union Soldior shall not be disqualified. Sixth. the court errs in holding that the unniversally accepted rule of construction is that the natural and appropriate office of a proviso is to restrain and qualify some matter which precedes the proviso and should be so confined. But if the court is correct in this, it will be remembered that the act of March 1st precedes the soldier proviso, and according to the court's theory supercedes it; and the act of March 2nd does not justify the court's or the land department's construction of the law We don't believe that the decision in the Smith-Townsand case could have been as it is without considering the act of March 1st as indicating the intention of c ongress. Seventh, the court errs in holding that the right to file a declaratory statement is given the soldier in Sec 2304 of the revised statutes This right is merely referred to in Sec. 2304, and the right to file a declaratory either in person or by agent is guaranteed in Sec. 2309 of the same chapter. This is a material error for the reason that the court holds that congress only intended to reserve this right by inserting the proviso. It was wholly unnecessary to insert the proviso for that purpose, but if it had been the intention of congress to secure only this right it evidently would have said as provided for in Sec. 2309 instead of Sec. 2304 unless we assume also that congress, like the court, did not know the section that provided for this right Eighth, the court errs in holding that other provisions of Sec 2304 changed the law previous to it's adoption in force, to the extent only of permitting a s ldier in person, or by agent to file a declaratory state-

ment in place of a homestead entry. Prior to the passage of the Soldier's Homestead act of June 8, 1872, all homesteaders within what was known as the Railroad Land Grant Limit were only allowed 80 acres. The act of June 8, 1872, known as the Soldier's Homestead Act gave to the honorably discharged Union soldier the right to homestead 160 acres of any public land subject to homestead entry, and not otherwise appropriated, while all other homesteaders were limited to 80 acres within the railroad limit until the act of March 3, 1879. Thus for seven years the ex-Union soldier enjoyed a privilege not enjoyed by other homestead settlers, as a reward for his services and loyalty to his country. The The Honorable Justices of our Oklahoma Supreme Court say that such a law as this is abhorrent to our theory of government —Page 20 printed record. Nineth, the court accepted the judgment in the Smith-Townsand case to the effect that it was a race between all outside the Territorial line at 12 o'clock on the day of opening for the various homesteads in the Territory, but errs in failing to notice the admitted fact that the plaintiff was one of those outside the line and one that made the race with others for his homestead. Tenth, the court errs in denying plaintiff a rehearing without considering the legal question presented in his petition. Eleventh, the court closes its decision with the crowning error in the opinion holding that plaintiff disqualified himself by entering upon a portion of the land thrown open to settlement by the act of March 2, 1889, after the passage of said act and prior to noon of April 22 following, and further, that the disqualification exists as to honorably discharged union soldiers to the same extent as it does to any other citizen. Thus holding squarely against nearly all the decisions of the land department that a simple entry into the Territory disqualifies the plaintiff.

ARGUMENT

Plaintiff's was one of the first cases tried at the Oklahoma City land office and at a time when it was erroneously held that any entry into the Territory between March 2, and April 22, 1889, disqualified. It is upon plaintiff's admitted entry into the Territory on April 20, as a passenger on the Santa Fe railroad that the demurrer was sustained, the court holding that this entry into the Territory disqualified him, and hence he had no cause of action The defendant relies upon this, insisting that by his own admission, the plaintiff disqualifies himself. The defendant in his brief before the Territorial Supreme Court presented two questions of law. First, that plaintiff by failing to appeal from the order of the commissioner lost his right to a further hearing. Second, that plaintiff has never litigated the title to this land in the land department and

therefore will not be heard in a court of equity. In part we reply to this, that defendant should not be heard upon these questions under his general demurrer, which is sustained wholly on the ground that plaintiff is disqualified. However, plaintiff did litigate so far as he could under the circumstances the title to this land in the land department by filing his motion for reinstatement of his entry, which has not yet been acted upon, and properly disposed of by the land department, and under the rules of practice before the land department, it had the same legal effect as an appeal and reserved the land from other disposition while pending.

The defendant stands upon his demurrer and can not rightfully raise any ulterior matter as a defense. He must stand or go down with the demurrer. The points raised are both questions that can be explained away by the introduction of evidence. If the defendant had filed an answer we could have filed the original copy of the notice from the land office requiring the plaintiff to relinquish, showing that he had no notice of right of appeal. The rules of practice in the land office requires this notice to be given. And the rules of practice before the land office governs the proceedings, while the case is before the land department, under rule 81—rules or practice before the land office, no appeal is allowed from interlocutory orders and decisions of the commissioner, and under rule 48, fourth paragraph: in cases where appeals are allowed if it is not shown that the party against whom the decision was rendered, was duly notified of his right of appeal, the case will be reopened. It devolves upon the defendant to show that due notice was given the plaintiff of his right of appeal, defendant's demurrer deprived plaintiff of his right to amend his petition and show that notice of his right of appeal was not given. The probable reason for not giving this notice is the fact that there is no appeal from orders of this character. In support of our claim we further cite 5th L. D. 377 to 380, 11th L. D. 191, 12th L. D. 235 and 684 and rule 66 second paragraph, rules of practice before the land department. Plaintiff's application for reinstatement reserved the land from other disposition until acted upon and properly disposed of. In support of this claim we cite 15th L. D. 569 to 571; "an application for reinstatement of a cancelled entry while pending operates to reserve the land covered thereby from other disposition." If there is any thing settled in the practice of the land department it is the rule that a relinquishment is void or voidable if made under duress, or not voluntarily made, or if made by mistake or through a misaprehension of the law. In support of this proposition we cite 2nd L. D. 135, 4th L. D. 281, 7th L. D. 470-471, 8th L. D. 194

10th L. D. 569, 15th L. D. 569, 16th L. D. 353-355, 14th L. D. 396. In all these cases the doctrine is clearly stated that a relinquishment not freely and voluntarily made is not binding on the relinquishor, and that on application and a proper showing the entry will be reinstated. Plaintiff alleges that as a matter of fact his relinquishment was not voluntarily made, and defendant by his demurrer admits it to be true. This seems to leave no question as to plaintiff's right at that time to a hearing before the Land Department upon his motion for reinstatement. The contention of the defendant that plaintiff lost his right by not appealing from the commissioner's order is not the law. Plaintiff was not bound to appeal, either way was open to him in the Land Department, to appeal or file an application for reinstatement. There is no appeal from an interlocutory order of the commissioner, and there was no notice given the plaintiff of his right of appeal. His application for reinstatement was doubtless the proper proceeding in the land office and reserved the land from other disposition. Plaintiff had a right at that time to a hearing before the Land Department upon his motion for reinstatement which he failed to secure, through no fault of his own, but because the land office officials did not do their duty. As we have said before, the defendant should not be heard upon these outside questions. Though they do not affect plaintiff's right to the land, they are not in harmony with his demurrer, and he does not rely upon them. He relies upon plaintiff's admitted entry into the Territory on April 20, 1889. This is in fact the only question in the case. If plaintff is a qualified entryman, he is entitled to the land, and he is a qualified entryman, unless his entry into the Territory on April 20 as herein before stated disqualified him. We will now discuss the question of plaintiff's qualification and right to a homestead in the Oklahoma Territory. The striking down of a citizen by depriving him of his just and lawful rights, by a judicial or any other arbitrary decree is a serious matter and goes to the foundation of civil goveramen.—a government that does not deal justly with its citizens has no excuse for existence. Our fathers started out with a grand declaration of human rights in 1776. We, again, while suffering from the results of a fratracidal war put into our constitution in 1865, just 90 years after the original declaration of human rights, the 14th amendment which declares, among other things, that no state shall deny to any person within its jurisdiction the equal protection of the laws. In this the United States government undertakes to place all citizens upon an equality before the law and to protect them in the exercise of such rights and privileges. This is what the plaintiff in this case is before the court asking, and to show the court that he has not

received just treatment and that the law has not been construed and applied in his case the same as it has been construed and applied in other similar cases. We refer the court to the Curnut-Jones case 21st L. D., page 40, and the cases there cited. These decisions of the department show that as a rule from the start in Oklahoma cases it was not held that any entry into the Territory during what was called the inhibited period disqualified, unless it was shown that some advantage was gained by such entry. In the case here cited, Mr. Jones lived close to the Oklahoma line and went into the Territory and to Oklahoma Station on the Santa Fe railroad frequently during the prohibited period, was well acquainted with the lands and had placed a foundation for a building on the land he intended to take for his homestead when the land was open to settlement. The foundation was put there before the act of March 2nd was passed and Mr. Jones made the run from the line to his claim after 12 o'clock, noon, April 22, 1889. It is held that he gained no advantage and was not disqualified. The plaintiff's case differs from the Jones case only in the fact that plaintiff was only in the Territory one time and had no foundation or any thing else on the land he intended to enter and that he went to the land office and made his entry in place of going to the land to make a settlement. Plaintiff took the chances of some one making a settlement on the land before he made his entry. There was but one out of the half dozen contestants he had that claimed a prior settlement. That was one Theodore W. Echelberger, who was on the Santa Fe railroad company's right-of-way, within a few feet of the west line of the claim, at and before 12 o'clock on the day of opening. He is long since out of the contest and is now dead. The decisions of the land department since the Curnutt V. Jones case, have been uniform, in holding that where a party gained no advantage by being in the Territory during the inhibited period and made the run from the line after 12 o'clock on April 22 is not disqualified. This is precisely our case and we ask the court to place us on an equality with Mr. Jones and the many others who have been given their land under similar circumstances. We refer the court to one or two late decisions: 25th L. D. page 273, Jackson et. al. vs Garrett (Syllabus): "Presence within the Territory during the inhibited period does not operate as a disqualification if no advantage is gained."

Devore vs. Riehl, page 380 22, A settler on leased land goes out after proclamation was issued opening the Cherokee Strip to settlement. These lands were opened to settlement in persuance of the act of Congress approved March 2, 1889, and this party had been living on leased land, within the Cherokee Strip, and was living there at the time the

President's proclamation was issued opening the same to settlement, and went out after the proclamation was issued He made the run from the line on the day of the opening to the land he undoubtedly had selected before, yet it is held that he gained no advantage and is not disqualified. We refer the court to one more case in 23rd L. D., pages 63 to 65, Heiskell vs. McDowell where both of the contestants had been within the Territory during the prohibited period and it is held that they are not disqualified thereby. We deem it unnecessary to refer further to these decisions; we have only referred to them to show the court that we have not received fair treatment in the Land Department In addition to the above our application for reinstatement was ignored by the commissioner of the land office (or overlooked) and the Hon. Secretary of the Interior misquoted our Attorney's statement of the evidence and the facts as stated by them in their brief before him, and formed his conclusions and rendered his decision on his misstatements and mistakes.

This is a double error of the Secretary First, in not reviewing the evidence in the case and forming his opinions from that, in place of taking the statements of the attorneys in their brief as a basis for his opinion. Second, in misquoting the evidence as stated by plaintiff's attorneys. The court is, no doubt, fully advised on all the points we may present, but nevertheless we desire to go as fully and as deeply into the merits of the case, and to a proper application of the law to it as a prudent use of valuable time will permit. On the first day of March, 1889, the act of Congress ratifying and confirming the agreement and articles of cession relating to the Creek or Muskogee Indian lands in Oklahoma Territory was approved. It applied to the lands laying between the south line of what was known as the Cherokee Strip and the North Fork of the Canadian river, about two-thirds of the land open to settlement at that time Sec. 2 of this act provides that these lands shall be a part of the public domain. Shall only be disposed of in accordance with the laws regulating homestead entries. That Sec. 2301 of the revised statutes shall not apply, and that any person who may enter upon any part of said lands prior to the time the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands, or lay any claim thereto. This act provides for the opening of these LANDS TO SETTLEMENT BY ANOTHER AND FINAL ACT OF CONGRESS SOME TIME IN THE FUTURE. Sec. 2 shows that Congress used the word occupy in its ordinary signification, and that it was understood that a person simply passing over the land or in and out of the Territory was not occupying any part of it, because they say that if you enter upon it you will not be permitted to occupy or

make entry of it. The Land Department in preparing the affidavit that all entrymen were required to make before being allowed to make entry, recognized the act of March 2nd as being the law governing the opening of these lands to settlement. Here it is: "I, John Doe, applying to enter a homestead do solemly swear that I did not enter upon and occupy any portion of the lands opened to entry and settlement in the President's proclamation dated March 23, 1889, prior to 12 o'clock, noon, of April 22, 1889."

We therefore insist that Sec. 2 of the act of March 1, 1889, is no part of the law governing the qualification of entrymen in the Oklahoma country. It seems manifest from the language used and the circumstances under which it was enacted, that this prohibitory clause was only intended to prevent any settlement upon these lands prior to the time they were opened to settlement, this appears to be all that was necessary at that time and all that was intended. Enter upon has a different meaning from entering. It is indicated by the words "enter upon any part of said lands," which means settlement upon any part of said lands prior to the time the same are opened to settlement by act of Congress. "Shall not be permitted to occupy, or make entry of, or lay any claim thereto;" in other words, if they settle upon them they will not be permitted to enter and occupy them. Meaning that part or tract settled upon in violation of law. Here we desire to call the attention of the court to the fact that the act of March 2nd contains a provision, not in the act of March 1st, to the effect that no person entering upon and occupying these lands shall ever be permitted to enter any of said lands. The difference as will be observed is that the act of March 1st deprives the illegal settler of the right to acquire title to the land he settles upon, while the act of March 2nd deprives him of the right to ever acquire title by entry to any of said lands. Settle as an intransitive verb—means to repose to rest; upon means resting or being upon a hill or upon a field or homestead. At the time of the passage of the act of March 1st it was not known when these lands would be opened to settlement, and so far as the legislators knew it might have been a number of years. It is not reasonable to suppose that it was intended to disqualify every person who passed through or went into the Territory during the time that might elapse before these lands were opened to settlement. However, on the following day, March 2nd, another act was approved that was passed by the same legislative body that passed the act of March 1st; this was the final act provided for in the act of March 1st and superceded it by taking its place in regulating the disposal of the Creek or Muskogee lands which Sec. 2 of the act of March 1st related

to. Sec 2 was only in force one day when it was wholly superceded by the act of March 2nd, which applied to the whole Territory opened to settlement at that time, while the act of March 1st applied to only a part of it. Considering as we do, that the act of March 2nd wholly supercedes and takes the place of the former act, in regulating the disposal of all these lands, we will consider the act of March 2nd as governing this case. Article 1st of the Constitution of the United States provides that all legislative powers are vested in Congress. Article 4 Sec. 3, second paragraph, provides that Congress has exclusive power to make all needful rules respecting the disposal of the public lands The acts of Congress with the approval of the chief executive, and without it in some cases are supreme. This brings us to the consideration of Sec. 13th, act of March 2, 1889.

Commencing with the second provision in the second paragraph relating to the rights of honorably discharged Union Soldiers and Sailors, as follows: "And provided further that the rights of honorably discharged Union Soldiers and Sailors in the late civil war as defined and described in Sections 2304 and 2305 of the revised statutes shall not be abridged." Here is a statute enacted by Congress expressing in plain terms the wish or intention of the legislators that the honorably discharged Union Soldier is excepted from any thing in the act of March 2, 1889, that might be construed so as to abridge his rights as they are provided for in the sections of the revised statutes referred to in the proviso. It embraces the whole of the Soldiers' Homestead Act of June 8, 1872. Section 2304, the first referred to, among otner things provides that every private soldier and officer who served in the army of the United States during the recent rebellion for ninety days, and who was honorably discharged, and has remained loyal to the government (requiring just three qualifications) shall on compliance with the provisions of this chapter as hereinafter modified, be entitled to enter upon, and receive patents for 160 acres of any public lands not otherwise appropriated, and subject to homestead entry. We desire to emphasize the fact that it is on compliance with the provisions of the Soldiers' Homestead Act of June 1872, Chap 338, Sec. 1, Vol. 17, page 333 U. S. statutes at large, and not on compliance with the provisions of the act of March 2, 1889, that the honorably discharged Union Soldier is entitled to his homestead in the Oklahoma country. There is no sooner clause in the Soldier's homestead act. Chief Justice Dale delivers the opinion of the Supreme Court of Oklahoma Territory in which we find the following errors. First, in holding that Congress only intended that the ex Soldier should be allowed the privilege of filing his

declaratory himself or by an agent, have six months after making his filing before commencing his settlement and improvements, and to have the term of his service in the army, to the extent of four years deducted from the time required to secure title under the homestead laws. Second, in basing the court's judgment on the erroneous quotations of the Secretary of the Interior from pages 17 and 18 of Perkins & Chandler's brief in the case when it was before him. It was ~~the~~ an error of the Secretary to draw his conclusions and base his decision on statements made by attorneys, even if he had quoted the attorney's statement of the evidence correctly—which he did not do—and the defendant admits that he did not. The judge however quotes the error in full and approves it as a finding of fact by the Secretary that must stand against the plaintiff, while as a matter of fact it is only the Secretary's conclusion drawn from an erroneous statement of the evidence, and also a misstatement of Perkins & Chandler's brief. By reference to pages 17 and 18 of their brief it will be found that they make no such statement as the Secretary puts into his decision. See exhibit C., printed record, page 9, Perkins & Chandler state the facts as they are set out in plaintiff's petition in this case and shown by the evidence and admitted by the defendant's demurrer. Third, the learned justice errs in ignoring the admitted facts and bases his decision upon the Secretary's misquotation of the facts as stated by Perkins & Chandler. Fourth, in assuming that plaintiff gained an advantage over other settlers, in the absence of any such finding by the Secretary. Fifth, in ignoring the facts that the "sooner" clause is an additional qualification applicable to homesteads in Oklahoma, and that it was so held in the Smith-Townsand case by the United States Supreme Court, 148 U. S., page 490. Sixth, in ignoring our contention that this additional qualification does not apply to the honorably discharged Union Soldiers of the late civil war. Seventh, in misconstruing and misquoting the provisions of section 2304 and 2305 of the revised statutes of the United States relating to the rights of honorably discharged Union Soldiers in Oklahoma, the judge admits that if the proviso in the act of March 2nd relating to the rights of the ex-Union Soldier is not annulled by what is called the "sooner" proviso which followes it—he is not disqualified. Eighth, the court errs in holding that the finding of facts as stated by the Secretary in his final decisions (Exhibit C. printed record page 8) is sufficient to disqualify the plaintiff.

Taking the statement of the case by the Secretary, wrong as it is, there is nothing in it to disqualify the plaintiff. Supposing that plaintiff

had went to Oklahoma Station on April 22nd and finding his son there went with him to a tent that his son had put up on the land and then he had left his son in charge of the land while he returned to Guthrie and secured the entry, on the afternoon of the next day, April 23rd. This whole transaction is assumed to have and did occur after 12 o'clock, noon, April 22nd, and after the land was legally opened to settlement. There is no claim that it ocurred before the hour of legal opening, and in fact it did not. Except the visit to Oklahoma on the 20th, what is there in it to disqualify the plaintiff, or that gave him any advantage over other settlers? There was an opportunity to get ahead of plaintiff at the land office which is thirty miles from where the land is located, and there was also a chance to make a settlement on the land any time from noon of April 2, up to 2 o'clock April 23, the time when plaintiff made his entry. We can see nothing in this transaction, if true, to legally disqualify the plaintiff. But it is mainly incorrect—there is no such evidence in the case nor no such statement was made by plaintiff's attorneys in their brief. It was perhaps a mistake of the officer or clerk who wrote the Secretary's decision, but it is difficult to understand how such a mistake could occur when the party is copying a brief or any other paper in a a case before him. The evidence shows that plaintiff's son was a man 30 years of age and that he was on the claim with the intention of taking it himself, which he had a right to do. If plaintiff had failed to get his entry on this land he would have filed on some other quarter while he was at the office. His sons being on the land was of no benefit to him; and after the entry was made it held the land for six months agains the world except a prior settler. It seems from the numerous insinuations of the defense in the case that it is a wish with them to create the impression with the court that plaintiff's son was on the land for the purpose of keeping other settlers off until the entry was made. In anticipation of this we make the following explanation: All the evidence there is on this point is that of Ecklberger and his testimony is squarely against such a surmise. Echelberger testifies that he approached plaintiff's son while he was putting up his tent immediately after 12 o'clock and told him that the claim was taken, that it was his, that he Echelberger, was the first settler and plaintiff's son replied, "that was ll right." Echelberger further testifies that he himself put in the whole afternoon of April 22 pulling up stakes and notifying people that the land was his There is no evidence that plaintiff's son said anything to anyone about claiming the land and in fact he did not. Echelberger had it all his own way as claimant of the land This explains all these matters as they appear in the evidence. But leaving all this out, and putting it upon the ground

of a wholesome public policy, it seems heathenish, even if this young man was trying to assist his old father to get himself a home. For the courts to condemn his generous conduct by taking his father's home from him and giving it to the worst boodler in the gang of a half dozen greedy contestants; and one too who was and is yet in collusion with one of our citizen speculators who has furnished the money to push the contest through to a successful conclusion. To do such a thing as this where there is no clearly defined law forbidding any thing done or claimed to have been done in the premises, either by the plaintiff or by his son, seems wretchedly unjust and wholly without adequate cause or justification, either in the law or in equity. If the words "enter upon and occupy" are allowed to stand for what they are defined to mean by every authority, legal and literary, there is no ambiguity, no conflic of terms, but perfect harmony, and every part of Sec. 13 is given effect. The 4th proviso refers to these lands as homesteads exclusively; no person is permitted to occupy a homestead prior to the time fixed by the proclamation of the President opening the same to settlement. Did the plaintiff enter upon and occupy any of these lands during the inhibited period? That he did is the contetion of the defendant, and the question to be settled by the court It is admitted that the plaintiff entered the Territory on the Santa Fe railroad passenger train with the crowd on the day of the opening, and it is not claimed that any undue advantage was gained by the plaintiff over other settlers. The rule in construeing statutes is that the words of a statute are to be taken in their natural and ordinary signification and import, and if technical words are used they are to be taken in a technical sense. In the construction of laws we are to examine carefully the import of words and phrases, we know of no reason why this just and wholesome and long established rule should be departed from in this case. Enter upon, as used in the United States statutes relating to homesteads, relates to the enty at the land office, it is so used in Sec 2304 and 2309 and others But outside of this it has a general meaning as entering upon a farm, a field, a lot, a journey, a course of lectures, or study; this is the sense in which these words are used ordinarily. But Congress left no room for contention as to the meaning of the final act providing for the opening of these lands to settlement. By adding the words and occupy to the words "enter upon," making it read, "that no person entering upon and occupying said lands will ever be permitted to acquire title thereto." The word occupy has but one meaning, it is general and means taking possession of some specific thing for personal use or benefit. And there is no reason to doubt that Congress used it in this sense in the act of March 2,

1889. If we are not to know the law by taking the words of the statutes in their ordinary sense and as they are dfined in the standard dictionaries of our language, we should not be held responsible for its violation until after the courts have placed a construction thereon. We have discussed the question of proper construction, not because we think the court is not fully advised in all these rudimentary matters, but because the construction first put upon what is called the prohibitory clause was subversive of the law, and it opened the highway to the most vicious, cruel and conscienceless gang of contestants that ever infested a frontier settlement, and persecuted a poor helpless people. There was nothing in these contests for the government. No one was trying to swindle the government, and the goverament had nothing to gain by them nor nothing to loose, except its reputation. It was simply a greedy squabble between greedy individuals, mostly for speculative purposes on the part of the contestants in which the wrong was generally successful on account of a more perfect system of work. We desire to call the attention of the court to the fact that in Sec. 14 of the act of March 2, 1889, Congress provides for the purchase and opening to settlement of the Cherokee Strip, the Sac & Fox, the Iowa, the Pottawatomie and the absentee Shawnee reservations; and put into that section the same prohibitory clause applying to all these reservations, and in precisely the same words used in Sec. 13 of the same act relating to the Oklahoma lands. The Cherokee Strip was opened in September, 1893, four years after the Oklahoma lands. The other reservations were opened in 1891, over two years after the Oklahoma lands were opened. It seems hardly necessary to say that if the act of March 1st applied to the Seminole Indian lands it applied also to these other reservations, and if the prohibitory clause contained in the proviso in Sec. 13 of the act of March 2nd disqualifies every one who entered the Oklahoma Territory, the same prohibitory clause in Sec. 14 of the same act must have the same effect upon persons who were on the Strip or any one of the reservations herein referred to at any time before they were opened to settlement and after the passage of the act of March 2, 1889. Yet it has not been so held or even thought of. We refer to this provision in Sec. 14 of the act of March 2, 1889, for the purpose of showing that Congress had no intention of disqualifying persons who entered these reservations for other purposes than settlement. The Cherokee Strip was open in pursuance of the following act approved March 3, 1893: "The President of the United States is hereby authorized at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided by proclamation to open to settlement any or

all of the lands not allotted or reserved in the manner provided in Sec. 13 of the act of Congress approved March 2, 1889.

INDIAN APPROPRIATION BILL.

"No person shall be permitted to occupy or enter upon any of these lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement, and any person otherwise occupying or entering any of said lands shall forfeit all right to acquire any of said lands:" (2nd paragraph Sec 10 act March 3, 1893.) It will be observed that this Congress, the one succeeding the Congress that enacted the law opening Oklahoma to settlement made an effort in this act to bring the prohibitory clause in harmonious line with the decisions of the Land Department on the "sooner" problem It is a well settled rule in the land office practice to hold any suspicious circumstances in a case against the enteryman who refuses to go on the witness stand and testify. In this case the land office officials apparently have taken it upon themselves to discredit the testimony of the plaintiff and his son, notwithstanding the fact that their testimony is wholly uncontradicted.

The learned Justice in delivering the opinion in the Smith-Townsand case says the construction insisted upon by the plaintiff, Smith, that is living upon any tract of land prior to the time when the lands should be opend to settlement. Their idea seems to be that parties might go wheresoever they pleased through this body of land without subjecting themselves to the disqualifications of the law, provided only, that before the date fixed for the opening they did not commence an actual living upon the particular tract they desired to enter as a homestead. Under such a construction anybody might go into the Territory and every quarter section might be occupied by a resident, and all that would be necessary to prevent the operation of the statute would be that at noon of April 22nd adjoining neighbors exchanged their residence. If the contention in the Smith-Townsand case was as above understood it was certainly not the law The statute says no one shall be permitted to occupy any of these homesteads prior to the time they are opened to settlement, and any one who does so occupy, will not be permitted to enter any of said lands. That is to say that any one who moved into the Territory and settled upon any of the lands before the hour of opening for settlement was disqualified. This is the point we are contending for. We insist that the law does not disquallify a person who simply passed through or went into the Territory and passed out of it again, during the inhibited period. The extreme case suggested by the learned

Justice would be an evasion of the law both in letter and in spirit. But there is no law that disqualifies the plaintiff, and no reason can be given for holding that he is disqualified, except that the claim he entered is a very valuable one. The contention that a simple entry into the Territory during the inhibited period was sufficient to disqualify an otherwise legal homesteader, is without either support of the statute, or the rules of equity. The learned Justice refers to the well settled rule that where the language of a statute is ambiguous or of uncertain meaning resort may be had to surrounding circumstances. To the history of the time, and the mischief or defect, the statute was intended to remedy. Numerous cases are cited in support of this theory, and numerous proclamations issued by President Hayes, Arthur and Cleveland are referred to—all of these proclamations and decisions were against persons seeking to settle upon these lands. No such proceedings were had against any one simply going into that country as a traveler, hunter or curiosity seeker, or in any other capacity except with the intention of settling there. In referring to the prohibitory clause the learned Justice say it (the sooner clause) is an additional qualification applicable in Oklahoma, and that Congress had the right to prescribe additional qualifications when it opens a particular tract to occupation. The learned Justice remarks that there is no distinction in favor of those legally in the Territory, and that if Congress had intended for parties rightfully in the Territory should have special advantages in the entry of the desired tracts it would have been very easy to have said so. Thus he recognizes the power and right of Congress to provide and save the rights of these people by special provision the same as it did in case of the honorably discharged Union Soldiers and Sailors. And it would have been just as easy to have said that any person entering this Territory or going upon these lands prior to the time they are opened to settlement shall not be permitted to make entry of or acquire title to any of said lands. If Congress had so intended, and as it did not do this we conclude that it did not intend to do it. When plaintiff made his entry of this quarter section of land and settled upon it as alleged in his petition, he acquired a vested right to it and an inceptive title, such as the officials of the land office have no power to sequester, except through the regular proceedings of the Department. He can not be ignored out of his right to this land. Congress says that no person entering upon and occupying said lands will ever be permitted to acquire title thereto. Which means that no person who settles in Oklahoma and is occupying any of the lands during the prohibited period will be permitted to acquire title to a homestead in said Territory. We insist that the literal meaning of "enter upon and occupy" is to settle

upon, because it is defined to mean this by every authority, and every one who is well enough informed as to the meaning of these terms, know it is the ordinary meaning of enter upon and occupy, and to construe these terms to mean any thing else is to ignore a rule of construction that is laid down in every work on judicial construction, and a rule that has been followed for centuries in all parts of the civilized world. There are other reasons we submit, and very forcible reasons, for believing that Congress didn't intend to disqualify persons simply because they set a foot upon these lands. First, because if such was the intention the same provision that was in Sec. 2 of the act of March 1st would have been continued in the act of March 2nd without alteration or modification. That was all that was necessary to express the intention, if it was the intention, to disqualify all persons who entered the Territory between March 2 and April 22. The fact that the words "and occupy" were added, "to enter upon" clearly expresses the intention to modify the prohibitory clause which was in Sec. 2 of the act of March 1st, we don't believe that Congress intended to deceive the people. But it was doubtless the intention to give everyone, as nearly as possible, an equal chance to secure a home after the hour of legal opening, not only in the race but in the contests that followed; such a conclusion is reasonable and is doubtless correct. Congressmen were well aware that thousands of persons engaged in herding stock, building and operating railroads; government employees, such as soldiers surveyors, freighters, mail carriers and marshals, also hunters, trappers, travelers and boomers. All these had been passing over these Oklahoma lands for a quarter of a century, and thousands knew where the best lands were, and the best route to them from the nearest point on the line—also knew the surveys and right where the corners were. Congress wisely anticipated that other thousands of persons would be seeking homes in Oklahoma who knew nothing about the country and who had never been inside the lines of the Territory, and in view of the assumption that Congress intended to give every one a fair chance to secure a home, it is unreasonable to hold that it was the intention to compel those who were unacquainted with the country to make the race in the dark in competition with those who knew the country well. No plan more unfair could have been devised. Another reason for believing that there was no intention to disqualify persons who were in the Territory otherwise than as settlers is the fact that the boomer element who had been raiding the Oklahoma country for years, were represented by their leader, Capt. Couch, assisted by Sam Crocker, Sid Clark, Van Horn of the Kansas City Journal, and

others as lobbyists looking after their interests in the Congress that passed the act of March 2, 1889, and in addition to this the boomers had numerous friends who were members of Congress. Among them were Congressman Springer of Illinois, Perkins of Kansas, Mansuer of Missouri and J. B Weaver of Iowa. The prohibitory clause was fully discussed in the committee room by the committee on Territories and as adopted was accepted by the friends of the boomers and understood to be so worded as not to disqualify those who were in the Territory temporarily, and not as settlers. In addition to this, it was these men—the friends of the boomers—in congress, with Gen J. B. Weaver as their leader who forced the bill through Congress as a rider on the Indian appropriation bill, and it is a strange conclusion for us to form that these Congressmen who had charge of the bill, and who were the friends of the boomers, intended to enact a law that would disqualify the very people they were trying to assist; and that too, by an insidious intention not expressed in the law. The proviso relating to the rights of the honorably discharged soldiers contained in Sec. 13 clearly indicates the intention to only disqualify those who settled in the Territory before 12 o'clock, noon, on April 22nd. We insist that Congress also has the right to prescribe the law that shall govern and regulate the disposal of any particular tract. In this instance Congress said the act of March 2nd should apply to and regulate the disposal of the Creek or Muskogee as well as the Seminole Indian lands. The courts are bound by this provision the same as by other provisions of the law We insist that the act of March 1st, which was incomplete and only applied to a part of the lands, and upon which this decision seems to mainly rest, was displaced by the act of March 2nd and became obsolete by the approval of the final and complete statute containing all the necessary, and all the intended provisions and regulations for opening the Oklahoma lands to settlement. We desire here to call the attention of the court to the language of the president's proclamation declaring these lands open to settlement. "Now, therefore I, Benjamin Harrison President of the United States, by virtue of the power in me vested by said act of Congress, approved March 2, 1889, aforesaid, do hereby declare and make known, that so much of the lands as aforesaid, acquired from or conveyed by the Muskogee (or Creek) nation of Indians and from or by the Seminole Nation of Indians, respectively, as is contained within the following described boundaries (here follows description), will at and after the hour of 12 o'clock, noon, of the 22nd day of April next, and not before, be opened to settlement under the terms of and subject to all the conditions, limitations and restrictions contained in said act of Congress approved

March 2, 1889, and the laws of the United States applicable thereto." Here is the proclamation from the highest authority declaring to the people who are anxiously awaiting the opening of these lands to settlement. That they are opened and disposed of under and in accordance with the provisions of the act of March 2, 1889. Congress says so in the law. The President says so in his proclamation, and we contend that the people had a right to believe that the act of March 2nd alone was the law govering the disposal of these lands. The court in the Smith-Townsand case evidently did not consider the provisions of the act of March 2nd sufficient to justify the construction put upon it by the Secretary of the Interior. For some reason the Congress which succeeded the one which passed the act of March 2, 1889. In providing for the opening of the Sac & Fox, Iowa, Pottowatomie and absentee Shawnee lands inserted the same proviso relating to the honorably discharged Union Soldiers and Sailors as is in the act of March 2nd, providing for the opening of Oklahoma, with the exception that they provide for abridging his rights to the extent of paying the price fixed for the land. In this act Congress recognized the fact that Sec. 2304 of the revised statutes gives the soldier his land free. This exception against the old soldier has been religiously observed by the land office officials, and we insist upon the exception in the act of March 2, 1889, in his favor, being observed also. The learned Justice in delivering the opinion in the Smith Townsand case says: "It may be said that if this literal and comprehensive meaning is given to these words it would follow that anyone who after March 1st and before April 22nd should chance to step within the limits of the Territory would be forever disqualified from taking a homestead therein, doubtless he would be within the letter of the statute, but if at the hour of noon on April 22nd when the barrier was destroyed he was in fact outside of the limits of the Territory, it may perhaps be said that if within the letter he was not within the spirit of the law and therefore not disqualified." This closing paragraph in the Smith-Townsand decision covers our case, but as the defendant's claim rests wholly upon the plaintiff entering the Territory on April 20th, and on account of the extreme views of our Territorial courts in these cases, we have felt it our duty to fully discuss the act of March 2, 1889, and all the questions relating to the plaintiff's qualifications as a homesteader and his right to the land.

Our contention is that under the present construction of the act of Congress of March 2, 1889, and the authorities cited the plaintiff was and is a qualified entryman and the cancellation of said entry was and is illegal and made under a misapprehension of law and is void.

Our next contention is that plaintiff being as admitted an honorably discharged Union Soldier and his entry being made under Sec. 2304 and 2305 of the revised statutes of the United States, the prohibitory clause does not apply to him, it being held both by the Supreme Court of Oklahoma and of the United States in the case of Smith vs. Townsand—Supra—to be a qualification and not a penalty, and that soldiers such as those described in Sec. 2304 (and the plaintiff is such) are excepted from the prohibitory provisions of said Sec. 13. If it is decided an additional qualification then its application to plaintiff would be an abridgement of his rights as defined under the sections aforesaid of the revised statutes.

It seems hardly necessary to cite further authorities in this case, as the only question to be decided by the court relates to plaintiff's qualification as a homesteader in the Oklahoma Territory. However, we cite the following authorities:

Black on Interpretation of Laws, page 270, defines the office of a proviso as follows and cites numerous authorities:

"A proviso is a clause added to a statute or to a section or part thereof which introduces a condition or limitation upon the operation of the enactment or makes a special provision for cases excepted from the general provisions of the law or qualifies or restrains its generality or excludes some possible grounds of its misinterpretation or of its extent."

The Supreme Court of the United States in Lysander vs. Babbitt et. al., 1 Black 55 to 62, Co-operative Edition, book 17 bottom page 94, and in construing a provision of an act of Congress applying to a class of officers says:

"We are of the opinion that the proviso referred to is not limited in its effect to the section where it is found; but that it was affirmed by Congress as an independent proposition and applies alike to all officers of this class."

As to limitations and constructions of provision see Black on Interpretation of Laws, page 273-275 and cases there cited, also Sutherland on Construction of Statutes title "Proviso" page 289, Sec. 218, defining office of proviso, same Sec. 222 to 225.

The foregoing authorities sustain our contention that the true construction of the proviso as a saving clause was and is that no other requirements than those enumerated in Sec. 2304 2305 of the revised statutes should be imposed on the class of persons enumerated. Nor should their right to enter and take a homestead be in any manner affected but should remain unabridged by any provision or provisions of said act of which it is a part, any other construction would render it nugatory and

defeat the very purpose of Congress to preserve intact all the rights of the class of persons named, as those rights existed prior to the passage of said act of 1889, and under the provisions of the revised statutes especially enumerating and defining them in consideration of the services rendered to the country.

The Land Department wholly overlooked the saving clause in favor of honorably discharged Union Soldiers and placed them on the same footing as other persons to whom the act of Congress applied generally. This was an abridgemnt of the plaintiff's rights, and the cancellation of his certificate was in violation of law and does not divest him of his right and superior equity in the land and gives him a standing in the court on the facts as set out in his petition to the relief prayed for.

In support of this right we refer to the case of Johnson vs. Townsley 13 Wallace, 72, and Rector vs. Gibbons, 111 U. S. page 276; in the latter case the court refering to the case of Johnson vs. Towsley says:

"This case is a leading one in this branch of the law and has been uniformally followed. The decision aptly expresses the settled doctrine of this court with reference to the action of the officers of the Land Department when the legal title has passed from the United States to one party when in equity and good conscience and by the laws of Congress it ought to go to another. A court of equity will convert the holder into a trustee of the true owner and compel him to convey the legal title. This doctrine extends to all officers having charge of proceedings for the alienation of any portion of the public domain. The party actually entitled under the law cannot because of the misconstruction of these officers be deprived of their rights."

The law has been disregarded and misunderstood by the officers of the Land Department and the rights of the plaintiff ignored and his entry finally wrongfully cancelled as to the entire tract. The court below erred in sustaining the demurrer to plaintiff's petition and dismissing his suit; to which he excepted at the time and appeals to this court to secure a reversal for the errors assigned; each and every error assigned is insisted upon as well taken.

CALVIN A. CALHOUN,
Appellant.